



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1998

Mr. Chris M. Borunda
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR98-1556

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116137.

The City of El Paso (the "city") received a request, from an attorney, concerning "any and all statements given by [the requestor's client] or by any witnesses." Specifically, the requestor requests the "relevant portions of the investigatory file, or any other files which relate to [a specified] matter, including any departmental files compiled by or located in the Airport, Dept. of Public Works, OMB, or with any contractor for the City of El Paso, specifically including Woodward-Clyde." In response to the request, you submit to this office for review a representative sample of the records which you assert are responsive.¹ You state that the responsive information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions and arguments you have raised and have reviewed the submitted information.

First, we consider your claimed exception under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, the city has not presented, and we are not aware of, any statutory or other legal authority which deems this information confidential by law. Therefore, we conclude that section 552.101 does not except any of the requested information from required public disclosure.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a) of the Government Code reads as follows:

- (a) Information is excepted from [required public disclosure] if it is information:
 - (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
 - (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. No. 588 (1991), 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).² Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).³

You state that "we seek to withhold all of the information gathered during the investigation due to pending litigation between the City and the EPA and because the information is related to the pending litigation." In this instance, the city has supplied this office with information which shows that litigation is pending or reasonably anticipated. Additionally, you have made the requisite showing that the requested information relates to anticipated or pending litigation for purposes of section 552.103(a). Therefore, the submitted information may be withheld under section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation.

³Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982).

As we resolve this matter under section 552.103, we need not address your other claimed exceptions. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 116137

Enclosures: Submitted documents

cc: Mr. Bruce Yetter
Attorney at Law
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El Paso, Texas 79905-2031
(w/o enclosures)